No. 81193-8

SANDERS, J. (dissenting)—The majority affirms the trial court's revocation of Daniel McCormick's special sex offender sentencing alternative (SSOSA) sentence for violating the condition that he not frequent areas where minors are known to congregate. Majority at 1. The majority excuses the State from proving that McCormick reasonably should have known that the food bank was an area where minors are known to congregate. Majority at 9-10. The majority holds that "the state and federal constitutions do not require the State to prove McCormick willfully violated a condition of his SSOSA sentence." Majority at 18. I dissent because the State does need to prove McCormick knew the food bank was an area where minors are known to congregate as due process in this context requires the State to prove McCormick willfully violated a condition of his sentencing alternative before revoking it.

The majority omits important facts about McCormick. McCormick is a disabled 61-year-old man with a low IQ (intelligence quotient) living on $450 monthly

disability payments. He is in a wheelchair and has traveled to St. Vincent dePaul food bank for years because it was the closest food bank to his house. McCormick depended on these trips to the food bank to eat. The food bank is located in the basement of a convent, not a grade school. Entrance to the food bank is in an alley separate from the grade school, and the grade school's playground is not visible from the entrance of the food bank. Additionally the food bank has limited hours of operation, opening at 9:00 a.m. McCormick usually arrived at the food bank 15 to 30 minutes before it opened, whereas children are dropped off at the school playground at 7:50 a.m. with classes beginning at 8:00 a.m. Even if McCormick arrived at the food bank at 8:30 a.m., he would not have seen any of the children because they would have been in class.

The majority does not even require the State to prove McCormick reasonably should have known this was an area where minors are known to congregate. This is minimal given the location of the food bank and the grade school. This invites a mere pretext to revoke McCormick's SSOSA sentence without proof that he even intended to violate the conditions. What threat to society is posed by a person in a wheelchair who goes to a food bank even if, unbeknownst to him, it is near a school?

The majority opinion runs afoul of *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). Danny Bearden pleaded guilty to burglary and theft, but instead of entering a judgment of guilt, the trial court sentenced Bearden to

probation and ordered him to pay a fine and restitution. Shortly after Bearden was placed on probation, he was laid off from work and could not find another job. Bearden had only a ninth grade education and could not read. He had no assets and was unable to pay the fine or restitution. The trial court revoked Bearden's probation, requiring him to serve the remainder of his probation in prison. The United States Supreme Court held, "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for failure to pay. If the probationer willfully refused to pay . . . the court may revoke probation and sentence the defendant to imprisonment . . . ." *Id*. at 672. The Supreme Court required the State to prove the offender willfully failed to pay the fine to constitutionally revoke the offender's probation, otherwise the offender would be punished simply for being indigent. The Court held an offender's probation could not be constitutionally revoked when the offender made a bona fide effort to pay a fine but was unable to do so.

The majority correctly states, "[t]he *Bearden* court did not address whether a finding of willfulness was required in other settings." Majority at 13. But the majority nonetheless forecloses the opportunity here, deciding that McCormick's situation is different from Bearden's, and does not require a finding of willfulness to revoke McCormick's probation. But I can discern no principled distinction.

The majority in essence punishes McCormick for the same reason the United States Supreme Court refused to punish Bearden: the lack of willful conduct. The

majority, in a footnote, simply disposes of punishing McCormick for frequenting a food bank, majority at 14, stating, "McCormick's argument lacks merit because in *Bearden*, the defendant could not avoid failing to pay the fines. In this case, there is no evidence McCormick's attending that specific food bank was the only way for him to obtain food." Majority at 14 n.5 (citation omitted).

McCormick needed to go to a food bank to eat. Punishing him for doing so without requiring the State to prove he willfully went to that specific food bank knowing it was located in an area where minors are known to congregate essentially punishes McCormick for being indigent and engaging in conduct he could not reasonably have foreseen violated a condition of his SSOSA. What purpose is served by punishing someone who had no knowledge that a condition was being violated?

In addition to needing to eat, McCormick had a low IQ, similar to Bearden's situation—his ninth grade education and inability to read. Not requiring the State to prove McCormick acted willfully to frequent areas where minors congregate contradicts the very premise of *Bearden*, 461 U.S. 660. The majority fails to recognize that McCormick was frequenting a food bank because he needed food, not frequenting a school or playground because he "needed" children.

The *Bearden* court stated, "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the

probationer to use illegal means to acquire funds to pay in order to avoid revocation." 461 U.S. at 670. Similarly here, revoking McCormick's probation because he frequents a food bank will not suddenly stop McCormick's need to go to a food bank. And in the end it serves only to exacerbate the situation when McCormick is released from prison, cannot find a job, and still needs to get food from a food bank. The court essentially allows the State to revoke McCormick's SSOSA suspended sentence because he is indigent and lacks knowledge of his alleged transgression.

The State should at least be constitutionally required to prove McCormick reasonably should have known the food bank was an area where minors are known to congregate. McCormick's due process rights were violated. Failure to require the State to prove McCormick acted willfully contradicts *Bearden*, 461 U.S. 660.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: